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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1944

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of Argument	5
Argument:	
I. Sections 1141 and 1142 of the Internal Revenue Code require that the stipulation as to the proper reviewing court be entered into within three months of the decision of the Tax Court	7
II. Neither the Commissioner nor the taxpayer may waive the statutory requirement that the stipulation be entered into within the three month period	16
Conclusion	22

CITATIONS

Cases:	
Burnrite Coal Co. v. *Riggs*, 274 U. S. 208	18
Charlotte National Bank v. *Morgan*, 132 U. S. 141	18
Commissioner v. *Realty Operators*, 118 F. 2d 286	16, 17
Connell v. *Hopkins*, 43 F. 2d 773	22
Crump v. *Hill*, 104 F. 2d 36	16
Finn v. *United States*, 123 U. S. 227	21
Forest Glen Creamery Co. v. *Commissioner*, 123 F. 2d 522	16
443 Cans of Egg Product, 226 U. S. 172	16
Grain King Mfg Co. v. *Commissioner*, 47 F. 2d 608	21
Holmstrom v. *Commissioner*, 94 F. 2d 747	21
Lee v. *Chesapeake & Ohio Ry.*, 260 U. S. 653	18
Louisville & Nashville R. R. v. *Mottley*, 211 U. S. 149	16
Massachusetts Fire & Marine Ins. Co. v. *Commissioner*, 42 F. 2d 189	21
Matton Co. v. *Murphy*, 319 U. S. 412	16, 17
McLish v. *Roff*, 141 U. S. 661	9
Miller v. *United States*, 104 F. 2d 343, certiorari denied, 308 U. S. 549, rehearing denied, 308 U. S. 634	16
Minnesota v. *United States*, 305 U. S. 382	22
Moore, In re, 209 U. S. 490	16, 18
Munro v. *United States*, 303 U. S. 36	21
Nash-Breyer Motor Co. v. *Burnet*, 283 U. S. 483	6, 11, 20
Nash-Breyer Motor Co. v. *Commissioner*, 20 B. T. A. 577	13
Nash-Breyer Motor Co. v. *Commissioner*, 42 F. 2d 192	13

Cases—Continued

	Page
Nash-Breyer Motor Co. v. *Commissioner*, 44 F. 2d 376	13
Nash-Breyer Motor Co. v. *Commissioner*, 61 F. 2d 1036	16
Neirbo Co. v. *Bethlehem Corp.*, 308 U. S. 165	16, 18
New England Furniture & Carpet Co. v. *United States*, 2 F. Supp. 650	22
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	15
Nye v. *United States*, 313 U. S. 33	16
Schollenberger, Ex parte, 96 U. S. 369	18
Smith v. *Commissioner*, 67 F. 2d 167	16
Spring Canyon Coal Co. v. *Commissioner*, 38 F. 2d 764	21
St. Louis &c. Railway v. *McBride*, 141 U. S. 127	18
State of Missouri v. *Todd*, 122 F. 2d 804	16
Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10	16
United Drug Co. v. *Helvering*, 108 F. 2d 637	9, 16
United States v. *Garbutt Oil Co.*, 302 U. S. 528	21
U. S. ex rel. Coy v. *United States*, 316 U. S. 342	16
Utah Power & Light Co., v. *United States*, 243 U. S. 389	21
Virginia Lincoln Furniture Corp. v. *Commissioner*, 67 F. 2d 8	16
Wegener v. *Commissioner*, 119 F. 2d 49, certiorari denied, 314 U. S. 643	6, 15, 21
Wilber Nat. Bank v. *United States*, 294 U. S. 120	21

Statutes:

Internal Revenue Code:	
Section 1141 (26 U. S. C. 1141)	2, 4, 5, 6, 7, 8, 11, 14, 17, 18, 20
Section 1142 (26 U. S. C. 1142)	3, 4, 5, 7, 8, 16
Judicial Code:	
Section 128 (a) (28 U. S. C. 225 (a))	19
Section 128 (d) (28 U. S. C. 225 (d)	19
Revenue Act of 1926, Sec. 1002, 44 Stat. 9, 110	11, 17
Revenue Act of 1934, Sec. 519, 48 Stat. 680, 761	11, 12
Revenue Act of 1936, Sec. 906 (g), 49 Stat. 1648, 1750, 7 U. S. C. 648. (g)	10, 17
Revenue Act of 1942, Sec. 510, 56 Stat. 798, 969, 7 U. S. C. (Supp. III) 648 (g)	17

Miscellaneous:

78 Cong. Record:	
Part 6, p. 6325	11, 12, 17
Part 7, pp. 7839–7840	12
10 Cyclopedia of Federal Procedure (2nd Edition, 1943) 638	9
Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928) sec. 206	19
H. Rep. No. 356, 69th Cong., 1st Sess., p. 54 (1939–1 Cum. Bull. (Part 2) 361)	11
H. Rep. No. 1385, 73d Cong., 2d Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 627)	12, 17
Moore, *Federal Practice* (1938) vol. 3, pp. 3390, 3394	9

Miscellaneous—Continued. Page

Preliminary Report of a Subcommittee of the Committee on Ways and Means on Prevention of Tax Avoidance, 73d Cong., 2d sess., p. 23 17
Rules of the Circuit Court of Appeals for the First Circuit (September 20, 1940) Rule 20 14
Rules of the Circuit Court of Appeals for the Second Circuit (September, 1938), Rule 36 9
Rules of the Circuit Court of Appeals for the Third Circuit (February 1, 1942), Rule 19 14
Rules of the Circuit Court of Appeals for the Fourth Circuit (October 21, 1941), Rule 28 14
Rules of the Circuit Court of Appeals for the Fifth Circuit, (February 1, 1939), Rule 37 9
Rules of the Circuit Court of Appeals for the Sixth Circuit (January 1, 1940), Rule 14 14
Rules of the Circuit Court of Appeals for the Seventh Circuit (December 1, 1941), Rule 33 14
Rules of the Circuit Court of Appeals for the Eighth Circuit (May 31, 1942), Rule 26 9
Rules of the Circuit Court of Appeals for the Ninth Circuit, (March, 1943), Rule 30 14
Rules of the Circuit Court of Appeals for the Tenth Circuit (November 18, 1943), Rule 33 14
Rules of the Court of Appeals for the District of Columbia (March 13, 1941), Rule 36 14
S. Rep. No. 52, 69th Cong., 1st Sess., p. 36 (1939-1 Cum. Bull. (Part 2) 332) 11

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals, sustaining the respondent's motion to dismiss the petition for review (R. 99–102), is reported in 141 F. 2d 636. The findings of fact and opinion of the Tax Court of the United States on the merits of the case (R. 27–42) are reported in 1 T. C. 378.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 27, 1944 (R. 98–99). The petition for certiorari was filed on June 2, 1944,

and granted on October 9, 1944, at which time the case was transferred to the summary docket (R. 103). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below had jurisdiction, under Sections 1141 and 1142 of the Internal Revenue Code, to review the decision of the Tax Court on the merits even though the required stipulation designating that court as the proper reviewing court was not entered into until after the expiration of the three-month appeal period prescribed by Section 1142.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 1141. COURTS OF REVIEW.
>
> (a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, * * *.
>
> (b) *Venue.*—
>
> (1) *In General.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United

States Court of Appeals for the District of Columbia.

(2) *By Agreement.*—Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

* * * * *

(26 U. S. C. 1141.)

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *. (26 U. S. C. 1142.)

STATEMENT

On July 10, 1942, petitioner, a Tennessee corporation with its principal office in that State, filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermination of deficiencies in income and excess profits taxes, together with penalties for failure to file returns, for the calendar years 1932 to 1936, inclusive, claiming that it was exempt from taxation under the provisions of Section 103

(7) or (8) of the Revenue Act of 1932 and corresponding provisions of Section 101 of the Revenue Acts of 1934 and 1936 (R. 3–23). The Commissioner filed an answer (R. 25–27) and a hearing was held on the merits (R. 1). On December 30, 1942, the Tax Court filed its findings of fact and opinion, holding that while petitioner was not subject to the excess profits tax it was not an exempt corporation and was liable for income taxes and penalties for the tax years involved (R. 27–42). The decision of the Tax Court was entered on March 12, 1943 (R. 42–43).

On June 11, 1943, one day before the expiration of the three-month appeal period prescribed by Section 1142 of the Internal Revenue Code, petitioner filed a petition for review addressed to the Circuit Court of Appeals for the Sixth Circuit (R. 43–45). Petitioner's counsel was advised by the Commissioner that the Circuit Court of Appeals for the Sixth Circuit lacked jurisdiction to entertain the petition for review, since no written stipulation designating that court as the one to review the case had been entered into, as required by Section 1141 of the Internal Revenue Code. However, at the request of petitioner's counsel, the Commissioner entered into such a stipulation on July 10, 1943, although entertaining serious doubts as to its timeliness and as to his power as an administrative officer to agree to waive any right which the Government might have to insist upon the dismissal of the

petition. The Commissioner was moved to enter into this stipulation because he did not desire, by his own refusal to act, to become the final arbiter of his own statutory power to enter into such a stipulation. Therein, however, it was specifically agreed that the Commissioner should have the right to file a motion to dismiss the petition for review and to question the timeliness and legal effect of the stipulation. (R. 97–98.)

The Commissioner subsequently filed a motion to dismiss the petition for review (R. 97), and the merits of the motion and of the case itself were briefed and argued together in the court below. On March 27, 1944, that court entered judgment sustaining the motion to dismiss (R. 98–99), and it is this judgment which is now before this Court for review.

SUMMARY OF ARGUMENT

I

Although a petition for review was filed in the court below within the time prescribed, that court then had no jurisdiction under Section 1141 of the Internal Revenue Code, and Section 1141 (b), read together with Section 1142, does not permit a retroactive validation of the petition for review by a stipulation entered into after the appeal period. A contrary construction of Section 1141 and 1142 would, in effect, extend the period of limitation within which review may be sought,

thwart the legislative purpose to remove doubt as to the proper appellate court and safeguard the right to review, and be wholly inconsistent with the rules of seven circuit courts of appeals and those of the United States Court of Appeals for the District of Columbia, which require that the petition for review contain "the necessary allegations to establish venue." *Wegener* v. *Commissioner*, 119 F. 2d 49 (C. C. A. 5th), certiorari denied, 314 U. S. 643, was, therefore, incorrectly decided.

II

Like the statutory requirement that the petition for review be filed within three months of the decision of the Tax Court, the correlative requirement that the stipulation be entered into within that period is jurisdictional and can be waived by neither the Commissioner nor the taxpayer. This is so notwithstanding the designation of Section 1141 (b) as a "Venue" provision, for the concept of venue cannot be fully applied to appellate courts. Section 1141 (b) (2) "authorized the parties to control the venue only by stipulation conforming to its terms". *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483, 487. To allow a waiver of the time limitation would have the undesirable consequences which Congress sought to avoid by imposing the limitation. In the absence of an express statutory authorization to the Commissioner to waive the limitation, the well-settled rule that an

officer cannot waive a substantial right of the Government prompts the conclusion that no such authority was given.

ARGUMENT

I

SECTIONS 1141 AND 1142 OF THE INTERNAL REVENUE CODE REQUIRE THAT THE STIPULATION AS TO THE PROPER REVIEWING COURT BE ENTERED INTO WITHIN THREE MONTHS OF THE DECISION OF THE TAX COURT

The decision of the Tax Court which the petitioner sought to have the court below review is one involving tax liability for years in which the petitioner filed no tax return. Under paragraph 1 of Section 1141 (b) of the Internal Revenue Code, *supra*, pp. 2–3, the United States Court of Appeals for the District of Columbia is the proper court to review such a decision except that, pursuant to paragraph 2, the Commissioner and taxpayer may enter into a written stipulation designating any circuit court of appeals as the reviewing court. In the instant case, the parties entered into such a stipulation, designating the Circuit Court of Appeals for the Sixth Circuit as the reviewing court. This stipulation, however, was not entered into until after the expiration of the three-month appeal period allowed by Section 1142 of the Code, *supra*, p. 3, petitioner having filed a petition for review in the Sixth Circuit,

apparently without noting that Section 1141 (b) requires a stipulation designating that court as the reviewing court. The fact that the stipulation was not entered into before the expiration of the appeal period is fatal to the jurisdiction of the court below.

Since reference is made in Section 1142 to Section 1141, the two sections must necessarily be construed together. Section 1142 provides for review of a Tax Court decision "as provided in section 1141" if a petition for "such" review is filed within three months of the decision of the Tax Court. The review provided in Section 1141, in a case where no return has been filed, is review by the Court of Appeals for the District of Columbia or "any circuit court of appeals * * * which may be designated by the Commissioner and the taxpayer by stipulation in writing." Until a stipulation has been entered into, then, review may be had only in the Court of Appeals for the District of Columbia, and only a petition for "such" review (Section 1142, supra, p. 3) is an effective petition. Here the taxpayer filed no petition for review in the Court of Appeals for the District of Columbia within the three-month period prescribed, and the petition addressed to the Circuit Court of Appeals for the Sixth Circuit was not a petition for "such" review as is outlined in Section 1141. A stipulation entered into more than three months after

the decision of the Tax Court cannot validate a petition for review, which, when filed, was filed in the wrong appellate court, for, if it can, as the court below noted (R. 102), the effect would be to extend "indefinitely, subject only to the concurring will of the Commissioner and the taxpayer, the three months' period of limitation."

"Unless all earlier precedents are to be disregarded, this kind of appeal dates only from the moment when the petition, which is the originating paper, is lodged in the court which the law prescribed." *United Drug Co.* v. *Helvering*, 108 F. 2d 637, 638 (C. C. A. 2d).[1] Certainly, it would have been a novel procedural device if Congress had expressly provided that a petition for review, filed within three months of the decision of the Tax Court, is an effective instrument even though the petitioner and the court in which the petition was filed had no way of knowing whether the petition was filed in the proper court, and

[1] When filed, the petition for review, like the allowance of an application for an appeal or a notice of appeal (see, e. g., 3 Moore, *Federal Practice* (1938), pp. 3390, 3394; 10 Cyclopedia of Federal Procedure (2d Ed. 1933) 638; *McLish* v. *Roff*, 141 U. S. 661), constitutes a perfection of the appeal and transfers jurisdiction of the case to the court to which the petition is addressed. Further steps on appeal, such as the filing of the record, date from the time of filing the petition for review. See rules of court in note 6, *infra*. See also Rules of the Circuit Court of Appeals for the Second Circuit (September, 1938), Rule 36; Fifth Circuit (February 1, 1939), Rule 37; Eighth Circuit (May 31, 1942), Rule 26.

might not know for some time after the statutory period for review had expired. The statute which Congress enacted permits of no such construction.[2]

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[2] Convincing evidence of the unlikelihood that Congress contemplated that the stipulation might be entered into after the expiration of the appeal period is found in the analogous provision of Section 906 (g) of the Revenue Act of 1936, 49 Stat. 1648, 1750, 7 U. S. C. 648 (g), concerning claims for refund of processing taxes:

> A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction * * *.

Even if the three-month limitation cannot be read as literally applicable to the stipulation, though such a reading seems warranted, the fact that the jurisdiction of the circuit court of appeals in which the petition and transcript are filed is said to be exclusive negates any possibility that Congress contemplated that a stipulation might be entered into thereafter.

Subsection (b) of Section 1141, with which we are here concerned, originated as Section 1002 (d) of the Revenue Act of 1926, 44 Stat. 9, 110. This Court, in *Nash-Breyer Motor Co. v. Burnet*, 283 U. S. 483, 487, recognized that this provision was inserted "in order that any doubt as to the proper court may be removed * * *." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 36 (1939–1 Cum. Bull. (Part 2) 332, 359); see also H. Rep. No. 356, 69th Cong., 1st Sess., p. 54 (1939–1 Cum. Bull. (Part 2) 361, 379). By Section 519 of the Revenue Act of 1934, 48 Stat. 680, 761, the provision before this Court in the *Nash-Breyer* case was changed, in a manner which is of no significance in the case at bar,[1] to substantially the present language of Section 1141 (b) of the Internal Revenue Code. The amendment making the change was proposed on the floor of the Senate by Mr. Harrison, who stated in part (78 Cong. Rec. 6325):

> The amendment is proposed in order to remove doubt now existing in certain cases as to the proper court in which to appeal from a decision of the Board of Tax Appeals.

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[1] Section 1002 (d) of the Revenue Act of 1926 provided that a decision might be reviewed: "In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

Thus, there is paramount in the entire legislative history of the provision for a stipulation the purpose of removing doubt as to the proper reviewing court.[4] That purpose can be effectuated only by having the proper court determined before the expiration of the appeal period so that the appellant need not run the risk of losing his right of appeal altogether by taking an appeal to the wrong court. If the court in which the petition is filed does not have jurisdiction and the prescribed period within which the petition must be filed has run, the right of appeal is lost. It is essential, therefore, that the appellant know, within the statutory period, to which court he may properly appeal. A stipulation designating the proper court serves that purpose, but can be of no aid to the appellant, who must file his petition before that period expires, if it is not entered into before the expiration of the appeal period. This must be so; for if there is power in either the Commissioner or the taxpayer to enter into the

[4] The remainder of the legislative materials relating to Section 519 of the Revenue Act of 1934 affords no aid on the question of the time within which the stipulation must be entered into. Mr. Harrison's amendment was agreed to without further discussion (78 Cong. Rec. 6325), the conference report merely referred to it in general terms (H. Rep. No. 1385, 73d Cong., 2d sess., p. 28 (1939–1 Cum. Bull. (Part 2) 627, 636)), the conference committee recommended that the House recede with a change in the section number (*ibid.*), and the conference report was agreed to by the House (78 Cong. Rec. 7839–7840).

stipulation after the appeal period, there is, of course, the corollary power to refuse to enter into the stipulation. Hence, a petition filed in a court which is the proper court only if it is so stipulated may result in barring appellate review if one of the parties, after the statutory period, refuses to agree. Such a refusal, within the statutory period, leaves the appellant free to file his petition in one of the courts prescribed by Section 1141 (b) (1). Accordingly, the power of stipulation does not serve its purpose of protecting the appellant's right of appeal unless the statute is construed as limiting the exercise of that power to the appeal period.

Finally, a construction of the statute which would permit the stipulation to be entered into after the expiration of the appeal period would be wholly inconsistent with the rules of seven circuit courts of appeals and those of the United States Court of Appeals for the District of Columbia. The rules of these courts, promulgated

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[5] Neither the Tax Court nor a circuit court of appeals may amend the petition and transfer jurisdiction to another circuit court of appeals. *Nash-Breyer Motor Co.* v. *Commissioner*, 20 B. T. A. 577; *Nash-Breyer Motor Co.* v. *Commissioner*, 42 F. 2d 192 (C. C. A. 2d); *Nash-Breyer Motor Co.* v. *Commissioner*, 44 F. 2d 376 (C. C. A. 9th). A second court can acquire jurisdiction only by the filing of a petition for review in that court within the three-month appeal period allowed by Section 1142. *Nash-Breyer Motor Co.* v. *Commissioner*, 61 F. 2d 1036 (C. C. A. 9th), where a petition had been filed in the Second Circuit within the appeal period.

under the authority of Section 1141 (c) (2) of the Internal Revenue Code (26 U. S. C. 1141 (c) (2)), require that a petition for review of a decision of the Board of Tax Appeals (now the Tax Court of the United States) contain "the necessary allegations to establish venue."* Manifestly, a petition for review, filed in a court which is proper only if a stipulation makes it so, cannot be filed in conformity with these rules unless the stipulation has already been entered into.

Whether the inference drawn from these rules be that all of these courts have construed Section 1141 (b) (2) as did the court below in this case, or merely that the necessities of wise and efficient judicial administration led these courts to impose this requirement, the materiality and persuasiveness of the rules can not be gainsaid. Even if the words of the statute and its legislative history do not alone compel the conclusion that the stipulation must be entered into within the statutory period, the view of those charged by the statute

* Rules of the Circuit Court of Appeals for the First Circuit (September 20, 1940), Rule 20; Third Circuit (February 4, 1942), Rule 19; Fourth Circuit (October 21, 1941), Rule 28; Sixth Circuit (January 1, 1940), Rule 14; Seventh Circuit (December 1, 1941), Rule 33; Ninth Circuit (March, 1943), Rule 30; Tenth Circuit (November 18, 1943), Rule 33; Court of Appeals for the District of Columbia (March 13, 1941), Rule 36 ("state the necessary facts to establish jurisdiction").

with the duty of formulating procedural rules for the review of Tax Court decisions is of the utmost value as an aid to a decision as to the meaning of the statutory provisions. Cf. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315.

The decision of the Circuit Court of Appeals for the Fifth Circuit in *Wegener* v. *Commissioner*, 119 F. 2d 49, certiorari denied, 314 U. S. 643, upon which petitioner relies, requires little comment.[1] The holding in that case was contrary to the holding of the court below in this case, but, in explanation of its conclusion, the court in the *Wegener* case merely stated that Section 1141 "fixes no time for making the agreement" and that the court found "no reason for writing such a limitation into the statute" (p. 49). As we have shown, Section 1141 must be considered in conjunction with Section 1142 and, when so considered, the conclusion is inescapable that the power to enter into a valid stipulation is circumscribed by the time limitation prescribed for appeal. While that conclusion may not be a happy one for this petitioner, it is a desirable one from the standpoint of orderly and proper administration of the tax laws.

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[1] This decision was against the taxpayer on the merits and it was the taxpayer who petitioned for a writ of certiorari. Accordingly, the present question was not involved in the petition.

II

NEITHER THE COMMISSIONER NOR THE TAXPAYER MAY WAIVE THE STATUTORY REQUIREMENT THAT THE STIPULATION BE ENTERED INTO WITHIN THE THREE MONTH PERIOD

As we have attempted to show, the statutory provision for stipulation of the proper reviewing court is necessarily intertwined with the provision that petitions for review must be filed within three months of the decision of the Tax Court. It is clear that the time limitation contained in Section 1142, like that imposed in other appeal provisions,[8] is jurisdictional,[9] and, as such, cannot be waived by the parties.[10] So also, "The legislative policy of speeding the disposal of income tax controversies by limiting the time for review" may not be nullified by allowing the parties to

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[8] See, e. g., *U. S. ex rel. Coy* v. *United States*, 316 U. S. 342; *Matton Co.* v. *Murphy*, 319 U. S. 412; *Nye* v. *United States*, 313 U. S. 33; *State of Missouri* v. *Todd*, 122 F. 2d 804, 807 (C. C. A. 8th); *Crump* v. *Hill*, 104 F. 2d 36 (C. C. A. 5th); *Miller* v. *United States*, 104 F. 2d 343 (C. C. A. 5th), certiorari denied, 308 U. S. 549, rehearing denied, 308 U. S. 634.

[9] *Forest Glen Creamery Co.* v. *Commissioner*, 123 F. 2d 522 (C. C. A. 7th); *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. C. A. 5th); *United Drug Co.* v. *Helvering*, 108 F. 2d 637 (C. C. A. 2d); *Smith* v. *Commissioner*, 67 F. 2d 467 (C. C. A. 4th); *Virginia Lincoln Furniture Corp.* v. *Commissioner*, 67 F. 2d 8 (C. C. A. 4th).

[10] *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 18; *443 Cans of Egg Product*, 226 U. S. 172, 184; *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149; *In re Moore*, 209 U. S. 490.

stipulate as to the proper appellate court after the time to petition for review has expired. Cf. *Commissioner* v. *Realty Operators,* 118 F. 2d 286, 288 (C. C. A. 5th); *Matton Co.* v. *Murphy,* 319 U. S. 412, 415.

This is so notwithstanding the designation of Section 1141 (b) in the Internal Revenue Code as a "Venue" provision.[11] In the usual sense

[11] While in 1933, Section 1002 of the Revenue Act of 1926, the predecessor of Section 1141 (b) of the Internal Revenue Code, was referred to in terms of jurisdiction rather than of venue in the Preliminary Report of a Subcommittee of the Committee on Ways and Means on Prevention of Tax Avoidance, 73d Cong., 2d Sess., p. 23, and in the Statement of the Acting Secretary of the Treasury regarding the subcommittee's report (pp. 15–16), the Conference Report on the provision which became Section 519 of the Revenue Act of 1934 described that section as a "venue" provision. H. Rep. No. 1385, 73d Cong., 2d sess., p. 28 (1939–1 Cum. Bull. (Part 2) 627, 636).

On the floor of the Senate, however, Mr. Harrison explained (78 Cong. Rec. 6325) that:

> The existing law is further amended so as expressly to grant permission to the Commissioner and the taxpayer to reach an agreement and stipulate that any circuit court of appeals will have *jurisdiction*, or to stipulate that the Court of Appeals of the District of Columbia will have *jurisdiction, regardless of whether or not the court so stipulated would otherwise have jurisdiction to review the decision.* [Italics supplied.]

The provisions for stipulations contained in Section 906 (g) of the Revenue Act of 1936, 49 Stat. 1648, 1750, 7 U. S. C. 648 (g), and Section 510 of the Revenue Act of 1942, 56 Stat. 798, 969, 7 U. S. C. (Supp. III) 648 (g), which prescribe the procedure on claims for refund of processing taxes, though substantially identical with the

in which the word is used, "venue" connotes the locality or place, where a defendant should be sued.[12] This connotation is carried into Section 1141 (b) in that the designation of the particular court which may review a decision of the Tax Court is in part to be determined by place. The idea of controlling jurisdiction by consent of the parties is also one which stems from the venue doctrine. Venue statutes give a defendant the right to object to suit in a court other than that in the proper venue. If the defendant makes seasonable and proper objection, the court, even though it has general jurisdiction otherwise, is required to relinquish jurisdiction. Conversely, the defendant may waive venue (see cases cited in note 12, *supra*) and the court in which suit is brought, if it has jurisdiction of the subject matter, may proceed to entertain the suit. Hence, the defendant may, by his consent or timely objection to improper venue, control the jurisdiction of a particular court to assume trial jurisdiction. This is similar to the right given the Commis-

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provisions of Sections 1141 and 1142 of the Internal Revenue Code, are not styled "venue" provisions, nor is the word "venue" used in the texts.

[12] *Ex parte Schollenberger*, 96 U. S. 369, 378; *Charlotte National Bank* v. *Morgan*, 132 U. S. 141, 145; *St. Louis &c Railway* v. *McBride*, 141 U. S. 127, 131; *In re Moore*, 209 U. S. 490, 501–508; *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211–212; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168.

sioner and taxpayer under Section 1141 (b) to confer jurisdiction upon a circuit court of appeals by entering into a stipulation designating the particular court as the reviewing court.

The adoption of the venue doctrine goes no further. Assuming the extraordinary conclusion that a distinction can be drawn between jurisdiction of the subject matter and jurisdiction of a particular court in appellate proceedings [13] and that Section 1141 confers jurisdiction over the subject matter on all of the circuit courts of appeals and the Court of Appeals for the District of Columbia, the provision for stipulation is not a counterpart of the right to object to or waive venue in the district courts.[14] What the Section does, plainly, is to confer the authority to select

[13] Although Section 128 (a) of the Judicial Code (28 U.S.C. 225 (a)), for example, grants to "the circuit courts of appeal" "jurisdiction" to review final decisions of the district courts, it has never been suggested that review may be had in a circuit court of appeals other than that designated by Section 128 (d). See also Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), sec. 206.

[14] The venue theory has always been applied in trial courts and has never been conceived to be applicable to appellate proceedings. It is based on a distinction between two types of jurisdiction and assumes recourse to another court, as we have shown. Effective jurisdiction over an appeal, however, is vested in only one court. An appeal to the wrong court, regardless of its "general jurisdiction" over the subject matter (see *supra*, note 13) is ineffective. The plaintiff in the trial court, on the other hand, may bring suit in a court in which venue is not properly laid, if the defendant does not object.

the proper reviewing court. Paragraph 1, specifies that "Except as provided in paragraph 2," a no-return case may be reviewed by the Court of Appeals for the District of Columbia. Thus, if, pursuant to paragraph 2, the parties, by written stipulation, designate a certain circuit court of appeals as the proper reviewing court, the Court of Appeals for the District of Columbia is not the proper reviewing court. The result is that only one court can be the proper one to review any given decision of the Tax Court.

The authority to designate a proper court by stipulation is not the authority to waive the statutory requirement that the proper court be designated within the appeal period. Section 1141 (b) (2) "authorized the parties to control the venue only by stipulation conforming to its terms." *Nash-Breyer Co.* v. *Burnet*, 283 U. S. 483, 487. The considerations, detailed above (*supra*, pp. 9–15), which compel the conclusion that the statute requires that the stipulation be entered into within three months of the decision of the Tax Court, are of equal significance in determining whether the parties may waive this requirement. The stipulation entered into after the statutory period cannot revive a petition for review timely filed, but in the wrong court; if the stipulation may be entered into after the appeal period, doubt as to the proper court in which to file the petition for review is not removed, and the Congressional

purpose is thwarted. Thus the circuit courts of appeals have uniformly considered the stipulation provision as jurisdictional.[15] *Massachusetts Fire & Marine Ins. Co.* v. *Commissioner*, 42 F. 2d 189 (C. C. A. 2d); *Spring Canyon Coal Co.* v. *Commissioner*, 38 F. 2d 764 (C. C. A. 8th); *Grain King Mfg Co.* v. *Commissioner*, 47 F. 2d 608 (C. C. A. 2d); *Holmstrom* v. *Commissioner*, 94 F. 2d 747 (C. C. A. 3d).

A further factor impels the conclusion that the power of stipulation may not validly be exercised after the expiration of the appeal period. At that time, the petition for review having been filed in the wrong court, the Government acquires a right to a dismissal, whereupon the decision of the Tax Court becomes final, and the action of the Commissioner in stipulating after the expiration of the appeal period would, if valid, result in a waiver of that right. It is, however, well settled that an administrative officer of the Government cannot waive a substantial right of the Government. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Munro* v. *United States*, 303 U. S. 36; *Finn* v. *United States*, 123 U. S. 227; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409;

[15] *Wegener* v. *Commissioner*, *supra*, p. 15, is no exception. The decision in that case was based simply on the view that the jurisdictional requirement did not include a limitation on the time within which the stipulation must be entered into.

Connell v. *Hopkins*, 43 F. 2d 773 (N. D. Tex.); *New England Furniture & Carpet Co.* v. *United States*, 2 F. Supp. 650, 651 (D. Minn.). See also *Minnesota* v. *United States*, 305 U. S. 382, 388–389. Since no exception to this rule is expressly contained in Section 1141, it would seem that the rule must be given full effect. At the very least, it is a weighty consideration when taken in conjunction with the express language of Section 1142 and the expressed purpose of Congress, shown above. The result is that the proper construction of Section 1141 (b) (2) is that Congress limited the parties' authority to stipulate to the time prescribed for appeal.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1944.

Industrial Addition Association, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 2, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

In this case petitioner, deeming itself exempt from income and excess profits taxes, failed to file any tax returns for the years 1932 to 1936 inclusive. The Commissioner assessed petitioner for the taxes for those years, with peralties, and the Tax Court has sustained the assessment as to the income taxes and attendant penalties. Petitioner, within the three months allowed for that purpose by § 1142 of the Internal Revenue Code, sought review of the Tax Court's decision by a petition for review filed with the Court of Appeals for the Sixth Circuit.

By § 1141 (a) of the Internal Revenue Code, entitled "Jurisdiction", the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia are given "exclusive jurisdiction to review the decisions" of the Tax Court. Subsection (b) (1), entitled "Venue", provides that "such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect to which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia." Since petitioner filed no return, the Court of Appeals for the District of Columbia was the court of proper venue under this subsection. If petitioner had made a return, it would have been required to file it with a collector whose office was within the sixth circuit, that of the court below; in that event, that court would have been the court of proper venue. The Code provides further, in subsection (b) (2): "Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any Circuit Court of Appeals . . . which may be designated by the Commissioner and the taxpayer by stipulation in writing."

The Commissioner suggested to petitioner that as it had filed no returns for the years in question and no written stipulation had been entered into as permitted by subsection (b) (2), the Circuit Court of Appeals for the Sixth Circuit was without "jurisdiction". In response to this suggestion, petitioner and the Commissioner, after the expiration of the three months period in which a petition for review could be filed, entered into such a written stipulation, designating the Court of Appeals for the Sixth Circuit as the court to review the decision of the Tax Court. The stipulation reserved to the Commissioner the right to challenge its timeliness and legal effect.

The Court of Appeals for the Sixth Circuit, on the Commissioner's motion, dismissed the petition for review for want of jurisdiction. 141 F. 2d 636. We granted certiorari, 323 U. S. —, to resolve an asserted conflict of the decision below, with that of the Court of Appeals for the Fifth Circuit in *Wegener* v. *Commissioner*, 119 F. 2d 49. The question presented is whether the court below had jurisdiction of the petition for review of the decision of the Tax Court, notwithstanding petitioner's failure to file the stipulation during the three months period, within which review of the Tax Court's decision could be sought.

The use in juxtaposition, in the statute, of the terms "jurisdiction" and "venue" marks a significant distinction. On the one hand, the statute confers power on the Circuit Courts of Appeals generally, to act judicially on petitions for review presented to them—which is "jurisdiction". On the other, such of those courts as are specified by the statute, or the stipulation which it authorizes, are designated as the place where, for convenience of the courts or parties or both, the petition will be heard—which is "venue".[1] Want of jurisdiction, unlike want of venue, may not be cured by consent of the parties; but when the court has jurisdiction, it has power to decide the case brought before it, even though the court having venue is one sitting in another circuit. *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 272-273; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211-212; *General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 434-435; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167-168; *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 453. The right to have a cause heard

[1] See Peoria Railway Co. v. United States, 263 U. S. 528, 535-536, where this Court explained the same distinction made in the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. §§ 41(28), 43.

in the court of the proper venue may be lost unless seasonably asserted; and in that event, the court of trial having jurisdiction but not the proper venue may render a judgment binding on the parties. *General Investment Co.* v. *Lake Shore Ry., supra*, 272; *Commercial Ins. Co. v. Consolidated Stage Co.*, 278 U. S. 177, 179; *Freeman* v. *Bee Machine Co., supra*, 453. The government may waive objections to venue, just as any other litigant may. *United States* v. *Hvoslef*, 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 24-25; *Peoria Railway Co.* v. *United States*, 263 U. S. 528, 535-536, and here such waiver, by stipulation, is contemplated by § 1141(b)(2).

We have no reason to suppose that the terms "jurisdiction" and "venue" were used in the statute in other than their usually accepted meaning, and no convincing reason has been advanced why that meaning should not be accepted here. Unless these plain terms are to be disregarded, all the Circuit Courts of Appeals are given jurisdiction to review decisions of the Tax Court upon a petition for review, that is, power to act judicially upon the petition. *Peoria Railway Co.* v. *United States*, *supra*, 535-536. Consequently when in this case petitioner filed its petition with the Court of Appeals for the Sixth Circuit, that court did not lack power to proceed with the cause, although the court of proper venue was the Court of Appeals for the District of Columbia, as prescribed by § 1141(b)(1). The parties were free to waive this defect of venue, by filing the stipulation in compliance with subsection (b)(2), designating the court below as the one to act upon the petition, which was already before it and of which it then had jurisdiction.

The government urges that the stipulation here did not comply with § 1141(b)(2), since it was not filed within three months of the decision of the Tax Court. But § 1141(b)(2) does not by its terms place any time-limitation upon the filing of the stipulation. The government relies on the three months limitation in § 1142, which is in terms applicable only to the filing of the petition for review. The petition here was filed within three months in a court having jurisdiction, and we see no reason to import into the stipulation provision, § 1141(b)(2), a time limitation which it does not contain.

It is true, as the government argues, that dismissal for want of the proper venue of a petition for review pending in a Court of

Appeals, controls the jurisdiction of the court. But in such a case jurisdiction is controlled only by terminating it. Here the case was not dismissed before want of venue was supplied by stipulation in the manner authorized by the statute. This imposed on the court the duty to exercise its jurisdiction in deciding the case.

The government relies, as did the court below, on our decision in *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483. When that case arose, the provision in the applicable Revenue Act for choice of venue by stipulation of the parties, did not permit them to stipulate for review in any circuit, but limited their choice to two specified circuits. The parties in that case stipulated for review of a decision of the Board of Tax Appeals in a circuit not authorized by the statute, and thus did not conform to the statutory venue requirement. We sustained the action of the Court of Appeals in dismissing the petition for review on the ground that the court was not bound to exercise its jurisdiction where the proper venue was in another court, saying, p. 487: "The restriction on the power of the parties to stipulate as to venue would be meaningless if they could waive it without the consent of the court." In this case the stipulation conforms to the statute, and is without the infirmity found to be fatal in the *Nash-Breyer* case.

Here the court acquired jurisdiction of the cause under the statute by the timely filing of the petition for review, and the parties were authorized by § 1141(b)(2) to stipulate that the review should be had in that court. On filing the stipulation the cause was then pending in the court having venue, as well as jurisdiction, and the case was improperly dismissed.

Reversed.